

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Parts 2 and 25 of the)
Commission's Rules to Permit Operation)
Of NGSO FSS Systems Co-Frequency with)
GSO and Terrestrial Systems in the Ku-)
Band Frequency Range;)
)
Amendment of the Commission's Rules to)
Authorize Subsidiary Terrestrial Use of the)
12.2-12.7 GHz Band by Direct Broadcast)
Satellite Licensees and Their Affiliates; and)
)
Applications of Broadwave USA,)
PDC Broadband Corporation, and)
Satellite Receivers, Ltd. to Provide)
A Fixed Service in the 12.2-12.7 GHz Band)

ET Docket No. 98-206
RM-9147
RM-9245

To: The Commission

JOINT BROADCASTERS' COMMENTS

Benedek Broadcasting Corporation,¹ Corridor Television, L.L.P.,² Eagle III
Broadcasting, LLC,³ Granite Broadcasting Corporation,⁴ and LIN Television Corporation⁵

¹ Benedek Broadcasting Corporation is the licensee of KAKE-TV, Wichita, KS; KLBY-TV & KUPK-TV, Wichita Falls, TX; KAUZ-TV, Wichita Falls, TX; KKTV-TV, Colorado Springs, CO; KDLH-TV, Duluth, MN; KGWC-TV, Casper, WY; KGWR-TV, Rock Springs, WY; KGWL-TV, Lander, WY; KGWN-TV, Cheyenne, W; KSIF-TV, Scottsbluff, NE; KHQA-TV, Quincy, IL; KLBY-TV, Colby, KS; KMIZ-TV, Columbia, MO; K02NQ, Columbia, MO; K11TB, Jefferson City, MO; KUPK-TV, Wichita, KS; WBKO-TV, Bowling Green, KY; WHOI-TV, Peoria, IL; WHSV-TV, Harrisonburg, VA; WIBW-TV, Topeka, KS; WILX-TV, Lansing, MI; WMTV, Madison, WI; WOWT-TV, Omaha, NE; WSAW-TV, Wausau, WI; WTAP-TV, Parkersburg, WV; WTOK-TV Meridian, MS; WTRF-TV, Wheeling, WV; WTVY-TV, Dothan, AL; and WYTV-TV, Youngstown, OH.

(collectively Joint Broadcasters), representing 52 local broadcast television stations, submit these comments in the above-captioned proceeding to encourage the Commission to promote competition in the market for the delivery of video programming by expeditiously granting the waiver requests and license applications of Northpoint Technology, Ltd. and its local Broadwave affiliates (collectively, Northpoint). Northpoint – and only Northpoint – has developed a technology for video programming delivery that may quickly be implemented across the country to provide competition to cable and direct broadcast satellite (DBS). Together, cable and DBS control 95.4% of all multichannel video programming distributor (MVPD) subscribers, and “the market for delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry.”⁶ Joint Broadcasters enthusiastically support the introduction of another competitor and another carrier of their signals in this highly concentrated market to help benefit the public with price, service, and innovation competition.

Currently, MVPDs reach 83.8% of all television households.⁷ Cable continues to be the dominant MVPD with 80% of all subscribers.⁸ In a distant second place, DBS has 15.4%

² Corridor Television, L.L.P. is the licensee of KBEJ-TV, San Antonio, TX.

³ Eagle III Broadcasting, LLC is the licensee of KKCO-TV, Grand Junction, CO.

⁴ Granite Broadcasting Corporation is the licensee of KSEE, Fresno, CA; KBWB, San Francisco, CA; KNTV, San Jose, CA; WEEK-TV, Peoria, IL; WPTA, Fort Wayne, IN; WDWB, Detroit, MI; KBJR-TV, Superior, WI; WKBW-TV, Buffalo, NY; WTVH, Syracuse, NY; and KRII, International Falls, MN (construction permit).

⁵ LIN Television Corporation is the license of WAVY-TV, Portsmouth, VA; KXAN-TV, Austin, TX; WISH-TV, Indianapolis, IN; WLFI-TV, West Lafayette, IN; WOOD-TV, Grand Rapids, MI; WOTV-TV, Battle Creek, MI; WANE-TV, Fort Wayne, IN; WIVB-TV, Buffalo, NY; WWLP-TV, Springfield, MA; and WTNH-TV, New Haven, CT.

⁶ Seventh Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, ¶ 137 (rel. Jan. 8, 2001) (“2000 Video Competition Report”).

⁷ *Id.*, ¶ 6.

of MVPD subscribers.⁹ At best, the MVPD marketplace – the video marketplace for over four-fifths of television households – has limited competition, with DBS competition having very little effect on cable rates, and at worst, it is a marketplace bereft of competition.¹⁰ Given the Commission’s commitment to promoting competition, further delay cannot be justified.

For over two years, the Commission has had before it the waiver requests and applications of Northpoint (through its Broadwave subsidiaries) for licenses for terrestrial, point-to-point video services in the 12.2-12.7 GHz band.¹¹ The Commission sought comment on the waiver requests, and the comment period ended nearly two years ago.¹² For nearly one and one-half years, the Commission has had Northpoint’s technical report of the results of its Washington, D.C. tests.¹³ The Commission has concluded that Northpoint’s operations can operate in the 12.2-12.7 GHz band without causing harmful interference to incumbent Broadcast Satellite Services (BSS).¹⁴ Last-minute, congressionally-required testing will be completed

⁸ *Id.*, ¶ 5.

⁹ *Id.*, ¶ 8.

¹⁰ *See id.*, ¶¶ 75-76. The only places that cable experiences competitive pressure on rates are the few communities where “effective competition” exists from another cable operator. *Id.*, ¶¶ 9, 138. However, statutory authority for DBS to carry local signals and the inception of that service have led to significant increases in DBS subscribership. *Id.*, ¶ 13.

¹¹ First Report and Order and Further Notice of Proposed Rulemaking, *In re Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation Of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide a Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, RM-9147, RM-9245, FCC 00-418, ¶¶ 263, 318 (rel. Dec. 8, 2000) (“*First R&O/FNRPM*”).

¹² *Id.*, ¶ 263 n.541, ¶ 318.

¹³ *Id.*, ¶ 264.

¹⁴ *Id.*, ¶¶ 213, 267.

within a month.¹⁵ Finally, in order “to encourage the provision of new technologies and service to the public,” the Commission has a statutory command to “determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.”¹⁶ In short, the Commission has every reason to hasten the introduction of new technology to increase competition in the MVPD marketplace by quickly acting on Northpoint’s waiver requests and license applications.

I. THE COMMISSION SHOULD NOT CAUSE FURTHER DELAY BY AUCTIONING SPECTRUM IN THE 12.2-12.7 GHz BAND.

The Commission proposes to unnecessarily complicate and delay resolution of Northpoint’s waiver requests and license applications by creating a new wireless service that would require a lengthy rulemaking to establish service rules followed by an application period and license auction.¹⁷ In that case, Northpoint would have to refile possibly years later when the Commission finally auctions licenses for the new service.¹⁸ Alternatively, the Commission states that it could auction the spectrum among the three terrestrial applicants to date.¹⁹ However, there simply is no reason to undertake any process that results in auctioning the spectrum in the 12.2-12.7 GHz band. The Commission has before it Northpoint applications that are not mutually exclusive with any other applications, and, thus, an auction is procedurally inappropriate.

¹⁵ Bruce Branch, *MITRE Finally Starts Northpoint Tests Despite SBCA Protest*, Communications Daily, 2 (Mar. 5, 2001) (testing should be complete on or around April 9, 2000).

¹⁶ 47 U.S.C. § 157.

¹⁷ *First R&O/FNPRM*, ¶ 327.

¹⁸ *Id.*

¹⁹ *Id.*, ¶ 329.

A. Commission Notices Gave Adequate Notice To All Interested Parties Of The Filing Deadline.

The applications of PDC Broadband Corporation (Pegasus) and Satellite Receivers, Ltd. (SRL) could be mutually exclusive with Northpoint's only if they were timely filed. However, both applications were filed well over a year after the January 8, 1999 filing deadline for applications in the 12.2-12.7 GHz band. Pegasus filed on April 18, 2000 and SRL on August 25, 2000.²⁰

Two FCC notices established the relevant filing window. First, the November 1998 *Ku-Band Cut Off Notice* clearly established that applications for licenses to use spectrum in the 10.7-12.7 GHz band, which of course includes the 12.2.-12.7 GHz band, were due by January 8, 1999.²¹ Any new applications were to be considered concurrently with the application of SkyBridge, L.L.C. (SkyBridge) to use spectrum in the Ku-band.²² Second, the November 1998 *FSS NPRM* clearly pointed out that the rulemaking "to permit non-geostationary satellite orbit ("NGSO") fixed-satellite service ("FSS") operations in certain segments of the Ku-band"²³ occasioned by a SkyBridge petition also would address Northpoint's petition for terrestrial

²⁰ *Id.*, ¶ 328 n.666.

²¹ Public Notice, *International Bureau Satellite Policy Branch Information: Cut-Off Established for Additional Applications and Letters of Intent in the 12.75-13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands*, Report No. SPB-141, at 1 (rel. Nov. 2, 1998) ("*Ku-Band Cut-Off Notice*").

²² *Id.*

²³ Notice of Proposed Rulemaking, *In re Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation Of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket No. 98-206, RM-9147, RM-9245, 14 FCC Rcd 1131, ¶ 1 (1998) ("*FSS NPRM*").

service sharing some of the same spectrum.²⁴ The Commission stated that it specifically undertook the NGSO FSS Proceeding “to address the spectrum sharing issues presented by SkyBridge’s and Northpoint’s proposed use of spectrum in the Ku-band range.”²⁵ Terrestrial use of 12.2-12.7 GHz spectrum was thus inextricably linked to NGSO FSS use of the same spectrum. It could not be clearer that if any party wished to share spectrum in the 12.2-12.7 GHz band with NGSO FSS applicants for any reason, then it must submit its application to the Commission no later than January 8, 1999.

B. The Pegasus and SRL Applications Should Be Dismissed As Late-Filed Obviating The Need For An Auction.

Given that all interested parties had adequate notice that the filing window for applications to use spectrum in the 12.2-12.7 GHz band closed on January 8, 1999 and given that the Pegasus and SRL applications were not filed until April 18 and August 25, 2000, respectively, the applications must be dismissed as definitively late-filed. There are no other factors that the Commission need consider. Consequently, the Northpoint applications, which were filed on January 8, 1999 and which have been shown to be technically compatible with the timely filed NGSO FSS applications, are not mutually exclusive with any other applications. Without mutual exclusivity, the perceived need – and, indeed, authority – for an auction evaporates.

²⁴ *Id.*, ¶ 8.

²⁵ *Id.*, ¶ 9.

II. THE COMPETITION IN THE MVPD MARKETPLACE THAT NORTHPOINT WOULD PROVIDE WOULD SERVE THE PUBLIC INTEREST.

A. Northpoint Will Quickly Provide Competition To Cable And DBS.

The Commission expresses concern that should it license Northpoint, Northpoint will be the only terrestrial video programming provider in the 12.2-12.7 GHz band.²⁶ The issue is not whether there will be a single provider of terrestrial video service in this particular band but whether a new competitor with other MVPDs will be able to expeditiously enter the market at all. Northpoint would be the only terrestrial provider in the 12.2-12.7 GHz band because only Northpoint has invested the creativity and resources to develop the technology to use this particular spectrum for terrestrial video delivery.²⁷ Now, only Northpoint is ready to immediately begin deploying its system nationwide to bring service to a mass market, and only Northpoint can quickly begin to provide competition to cable and DBS in the highly concentrated MVPD market.²⁸ If other terrestrial competitors eventually develop, then they can make the same applications and the same showings of technical compatibility as Northpoint, and the Commission may consider them on a case-by-case basis.

B. Local Television Service Would Benefit From Northpoint's Entry.

Not only would Northpoint be a new MVPD competitor, it would provide another avenue for retransmission of local broadcasting signals. It is therefore particularly heartening that as a potentially major competitor of cable and DBS, Northpoint has committed to shoulder local signal carriage obligations, including, for example, digital as well as analog carriage of

²⁶ *First R&O/FNPRM*, ¶ 327.

²⁷ Among other indications only Northpoint is ready to implement service, neither Pegasus nor SRL submitted technology to MITRE for independent testing of compatibility with DBS technology. March 5, 2001 Communications Daily, *supra*, at 2.

²⁸ *See, e.g.*, Northpoint August 29, 2000 Ex Parte Submission, at 2.

local television stations during the transition. Northpoint has indicated that it is willing to provide carriage for all local station signals,²⁹ and, consequently, the public's interest in having access to local broadcast service would be served by Northpoint's entry.

* * * * *

Already, two years have passed without Commission action on Northpoint's license applications and waiver requests. While some of that time undoubtedly has been consumed with necessary testing and debate, there now remains no major impediment to the Commission granting the waivers and licensing Northpoint. No reason exists to undertake a lengthy new proceeding and auction that could delay the award of licenses in the 12.2-12.7 GHz band for several more years. Northpoint's timely filed applications are not mutually exclusive with any other timely filed applications, and no auction is warranted or authorized. Given the need for genuine, price-reducing, service-enhancing competition in the MVPD marketplace, ample reason exists to hasten the entry of a new competitor. Unquestionably, that is what the Commission should do by expeditiously granting Northpoint's license applications and waiver requests.

²⁹ *Id.*, at 22 (“Northpoint’s Broadwave Affiliates have committed to carry all local broadcast television channels from the first day of operation even in the smallest market.”).

Respectfully submitted,

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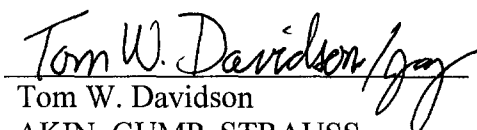
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